McCARTHY MINING AND DEVELOPMENT CO.

IBLA 84-369 Decided June 13, 1985

Appeal from a decision of the Anchorage District Office, Alaska, Bureau of Land Management, declaring lode mining claims null and void ab initio. AA-44968 through AA-44995.

Affirmed.

1. Mining Claims: Lands Subject to -- Mining Claims: Relocation -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

APPEARANCES: C. G. Burdick, president, McCarthy Mining and Development Company, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The McCarthy Mining and Development Company has appealed from a decision of the Anchorage District Office, Alaska, Bureau of Land Management (BLM), dated February 13, 1984, declaring 28 lode mining claims, AA-44968 through AA-44995, null and void ab initio. 1/

On September 21, 1981, BLM received copies of the location notices for appellant's mining claims for recordation pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1982). The location notices stated that appellant's mining claims had been located on September 4, 1981. The claims are situated within protracted T. 4 S., R. 15 E., Copper River Meridian, Alaska.

1/ The claims are the North Butte Nos. 1 through 12, AA-44968 through AA-44979, and the East Butte Nos. 1 through 16, AA-44980 through AA-44995.

In its February 1984 decision, BLM declared appellant's mining claims null and void ab initio because, at the time they were located, the land was withdrawn from mineral entry by Public Land Order No. (PLO) 5653. Effective November 16, 1978, PLO 5653 withdrew the affected land, subject to valid existing rights, "from settlement, sale, location, entry, or selection under the operation of the public land laws, including but not limited to the mining laws (30 U.S.C. Chap. 2)," for a period of 3 years, i.e., until November 16, 1981. The land was subsequently permanently withdrawn when included in the Wrangell-Saint Elias National Park, Preserve and Wilderness, pursuant to sections 201 and 701 of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2377, 2417 (1980), which was enacted December 2, 1980. 2/

In its statement of reasons for appeal, appellant contends the mining claims were originally located between November 22, 1968, and December 20, 1969, and, therefore, the claims predate the November 16, 1978, withdrawal. Appellant explains:

> Having never received notification of the 1979 deadline to register all mining claims, we contacted the Bureau of Land Management in Anchorage. Their instructions were that the only way to register these claims would be to refile the location notices. These notices, along with filing fees for the 28 claims were sent to the B.L.M. office in Anchorage on Sept. 21st 1981.

Appellant submitted copies of the original location notices for its claims in support of this contention.

[1] It is well established that a mining claim located on land which is not open to mineral entry confers no rights on the locator and is properly declared null and void ab initio. Mineral Life Corp., 81 IBLA 103 (1984), and cases cited therein. Thus, to the extent appellant would rely on the September 1981 location notices, appellant's mining claims were properly declared null and void ab initio.

Appellant seeks to rely on mining locations made in 1968 and 1969, which was prior to the withdrawal effected by PLO 5653. However, these location notices are for mining claims which are conclusively deemed to have been abandoned pursuant to section 314(c) of FLPMA.

Section 314(b) of FLPMA provides that, in the case of a mining claim located prior to October 21, 1976, the claimant was required, "within the three-year period following October 21, 1976," to file a copy of the location notice with the proper BLM office. The deadline for filing, therefore, was October 22, 1979. See 43 CFR 3833.1-2(a) (1982). Failure to file timely is deemed conclusively to be an abandonment of a claim and the claim is extinguished and therefore void. 43 U.S.C. § 1744(c) (1982); 43 CFR 3833.1-1.

2/ BLM also held in its February 1984 decision that appellant's mining claims were deemed to be abandoned and void pursuant to section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1982), for failure to file timely either affidavits of annual assessment work or a notice of intention to hold the claims in 1982, in accordance with 43 U.S.C. § 1744(a) (1982). Because of our disposition of this case, we need not reach the question of whether the claims are properly deemed abandoned and void for this reason.

In the present case, the record discloses appellant did not file copies of its location notices until September 21, 1981. On appeal, appellant admits that it missed the "1979 deadline," and had to relocate the claims and file copies of the relocation notices with BLM.

A recent Supreme Court decision, United States v. Locke, 105 S. Ct. 1785 (1985), 3/ interpreted the relevant statute. The Supreme Court stated:

> Congress intended in § 314(c) to extinguish those claims for which timely filings were not made. Specific evidence of intent to abandon is simply made irrelevant by § 314(c); the failure to file on time, in and of itself, causes a claim to be lost. See Western Mining Council v. Watt, 643 F.2d 619, 628 (CA9 1981).

As a result of appellant's missing the "1979 deadline" the claims located in 1968 and 1969 were extinguished. This fact precludes the September 1981 relocation of appellant's claims from relating back to the original date of location, i.e., prior to the intervening withdrawal. Such relation back is permitted only in the case of amendment of claims, which are in good standing, as opposed to relocation of abandoned claims. R. Gail Tibbetts, 43 IBLA 210, 86 I.D. 538 (1979), overruled in part on other grounds, Hugh B. Fate, 86 IBLA 215 (1985). As stated in Tibbetts:

> No amended location is possible, however, if the original location was void. See Brown v. Gurney, 201 U.S. 184, 191 (1906). A void claim would be one in which a locator has failed to comply with a material statutory requirement. Flynn v. Vevelstad, 119 F. Supp. 93 (D. Alaska 1954), aff'd, 230 F.2d 695 (9th Cir. 1956).

Id. at 218, 86 I.D. at 542. Thus, appellant is unable to rely on the earlier locations. Its September 1981 locations were made after the withdrawal of the land from location. We conclude that appellant's mining claims were properly declared null and void ab initio. Anthony Juskiewicz, 79 IBLA 267 (1984).

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Franklin D. Arness
Administrative Judge.

3/ Consideration of this and other appeals involving failure to make timely filings pursuant to 43 U.S.C. § 1744 (1982) was suspended pending the Supreme Court determination in Locke, as the constitutionality of that statute was at issue in Locke.